

MOTION TO DISMISS:

V.

IMPROPER PANEL SELECTION PROCEDURES

DAVID M. HICKS

4 October 2004

The Defense in the case of the *United States v. David M. Hicks* moves for dismissal of the charges against Mr. Hicks, and states in support of this motion:

1. Synopsis: The selection of members for the military commission in this case was conducted in a manner that explicitly and systemically excluded members based on rank. Systematic exclusion of certain ranks from sitting on military criminal tribunals is unlawful. Accordingly, the commission lacks jurisdiction to try Mr. Hicks, and the charges against him should be dismissed.

2. Facts:

a. Military Commission Order No. 1 (MCO1), establishes that the only qualification to serve as a commission member is that the individuals selected be commissioned officers in the United States armed forces, including reservists on active duty, National Guard personnel on active duty, or retired personnel on active duty.

b. MCO 1 requires the presiding officer be a judge advocate as well.

c. On 20 December 2002, the General Counsel to the Department of Defense issued a memorandum to the Secretaries of the Military Departments requesting candidates for commission members and presiding officers. In this memorandum, the General Counsel instructed the Military Departments to nominate officers in the pay grade of only O-4 and above. (See Exhibit 1).

d. The U.S. Marine Corps, Navy, U.S. Army and U.S. Air Force submitted candidates for commission members and presiding officers meeting the mandatory criteria of grade O-4 and above only. (See Exhibit 2).

e. On 25 June 2004, the Legal Advisor to the Appointing Authority (hereinafter "LEAA") provided the written guidance to the Appointing Authority on the selection of commission members and presiding officers. The LEAA indicated that the General Counsel's criteria were more restrictive than the criteria contained in MCO No. 1, and informed the Appointing Authority that he was not bound to select only from the names provided. The guidance from the LEAA also cautioned that rank could not be "used for the deliberate or systematic exclusion of otherwise qualified persons from commission membership." (See Exhibit 3).

f. Enclosed with the LEAA's guidance was a spreadsheet listing the services' nominations, which failed to contain the name of any officer below pay grade O-4. No other

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names or lists of names of potential candidates were provided to the Appointing Authority. (See Exhibit 4).

g. The appointing Authority selected officers in the pay grade of 0-5 and above to serve as commission members and presiding officer(s). The Appointing Authority selected only those officers included on the nomination list provided to him. *Id.*

3. Discussion:

Mr. Hicks has the right to a "full and fair" trial, which requires that the members of the commission be fair and impartial. This right is the same for military members during proceedings at a court-martial. The fairness of the selection process in this case should be determined by reference to the standards, practices, and case law used in military justice practice, as well as concurrent constitutional and other rights under U.S. and international law.

In *United States v. Kirkland*¹, the Court of Appeals for the Armed Forces (hereinafter "CAAF") held that the systematic exclusion of qualified personnel based on rank constituted reversible error. In *Kirkland*, nominees for court-martial members were solicited from subordinate commands and provided to the general court-martial convening authority -- excluding pay grades E-6 and below, however. Also,, even though the general court-martial convening authority knew he could select personnel not listed on the recommendation sheets submitted to him, the CAAF still found error and overturned the sentence in the case.

Analyzed pursuant to those standards, the instruction here was clearly contrary to the criteria set forth in MCO No. 1. The General Counsel's instructions deliberately excluded all officers in the pay grade of 0-3 and below. The effect of the instructions was to exclude from consideration for service on this military commission the **majority** of all commissioned officers serving in the U.S Armed Forces. This deliberate exclusion was further reflected in the ultimate choices made by the Appointing Authority.

Analyzed pursuant to those standards, the instruction here was clearly contrary to the criteria set forth in MCO No. 1. The General Counsel's instructions deliberately excluded all officers in the pay grade of 0-3 and below. The effect of the instructions was to exclude from consideration for service on this military commission the **majority** of all commissioned officers serving in the U.S Armed Forces. This deliberate exclusion was further reflected in the ultimate choices made by the Appointing Authority.

Moreover, even though the LEAA recognized the impropriety of the exclusion, the error was not corrected. While he LEAA advised the Appointing Authority that the latter could choose names not submitted among the nominations, he did not provide either a list of other available officers, or any other information that would facilitate compliance with MCO No. 1. Nor could the Appointing Authority be expected to possess such information independently. Although the Appointing Authority had formerly served on active duty as a general officer in the U.S. Army, he could not reasonably be perceived to know of qualified non-recommended commissioned officers in the rank of 0-3 and below from all four uniformed services.

¹ 53 M.J. 22 (CAAF 200)

Exclusion of otherwise qualified officers based on rank, or the appearance of such categorical exclusion, strikes at the heart of the "essential fairness and integrity" of any system of justice. The deliberate, explicit, and systematic exclusion of a majority of the eligible officers in armed forces from consideration for service on a military commission constitutes *per se* unlawful command influence. Such unlawful command influence robs this commission system of both its legitimacy and jurisdiction. Analogously, a civilian court jury that purposefully excluded from the venire otherwise qualified persons who earned less than a specified amount of money, or possessed less than a set number of assets, would be unconscionable and intolerable, and would represent the worst type of jury-rigging imaginable in a system in which all accused are entitled to equal treatment before the law, and a jury chosen from an applicable cross-section designed to ensure impartiality and fairness. Accordingly, these commission proceedings are fatally tainted, and must be dismissed.

4. In making this motion, or any other motion, Mr. Hicks does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this military commission to charge, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

5. **Evidence:** Exhibit 1: Memo from DOD General Counsel of 20 Dec 02
Exhibit 2: Services nominations of commission members
Exhibit 3: Letter from the Legal Advisor of 25 Jun 04
Exhibit 4: 9 pages of nominated personnel.

6. **Relief Requested:** The defense requests the charges be withdrawn from this commission.

7. The defense request oral argument on this request.

By: 

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Jeffery D. Lippert
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GENERAL COUNSEL

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

DEC 20 2002

SecNav

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Identifying Personnel to Serve as Members and Presiding Officers for Military Commissions

- References: (a) President's Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism"
- (b) Department of Defense Military Commission Order No. 1, "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism," dated March 21, 2002

The Department of Defense must develop a "pool" of candidates to serve as commission members and presiding officers in the event that military commissions are convened pursuant to the above orders. This pool, comprised of candidates submitted by you as follows, will serve as the principal source from which the Appointing Authority may draw to empanel commissions. The pool should be replenished continually, so that there is always a list of appropriate officers from which to choose.

As set forth in section 4(A) of reference (b), each commission shall consist of at least three but no more than seven members, one of whom shall be designated as the presiding officer of the proceedings of that commission. There shall also be one or two alternate members. The members and alternate members shall be commissioned officers of the United States armed forces, including without limitation reserve personnel on active duty, National Guard personnel on active duty in Federal service, and retired personnel recalled to active duty. Consistent with the preceding guidance, I request that you provide from each of your services a list of 25 officers who meet the following criteria:

- Mandatory Criteria
 - Grade of O-4 or above
 - Reputation for integrity and good judgment
 - Top Secret security clearance
- Preferred Criteria
 - Combat or operational experience
 - Command experience

At least five of those 25 officers should also meet the following eligibility criteria for designation as presiding officers:

- Grade of O-5 or above
- Article 26(b) and (c), UCMJ, certified (or previously certified)
- Substantial litigation experience involving major cases
- Law of armed conflict training or experience

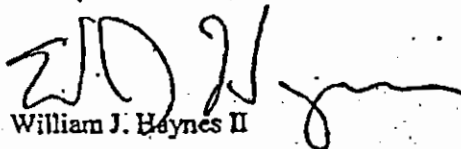
Attach 1 to Review Exhibit _____

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With your list of candidates, please submit a completed copy of the attached Military Commission Member Data Sheet for each officer nominated, signed by the candidate officer.

Candidates must be available for short-notice temporary duty for up to 90 days. Please be sure to maintain a full list of 25 qualified candidates for each of your services, at least five of whom are also qualified for designation as presiding officers, by immediately nominating a replacement for any candidate who becomes unavailable.

Please respond by January 10, 2003. Candidates should be available as of the date of your response. You should not interpret this requirement, however, as signaling an intention to appoint a commission at any particular time. My point of contact for this matter is Ms. Lisa Simon, who can be reached at (703) 695-3392.


William J. Haynes II

Attachment:
Military Commission Member Data Sheet

cc: Chairman of the Joint Chiefs of Staff
Under Secretary of Defense for Policy
Under Secretary of Defense for Personnel and Readiness

Attach 1 to Review Exhibit _____

Page 2 Of 2 001860

U. S. MARINE CORPS NOMINATIONS

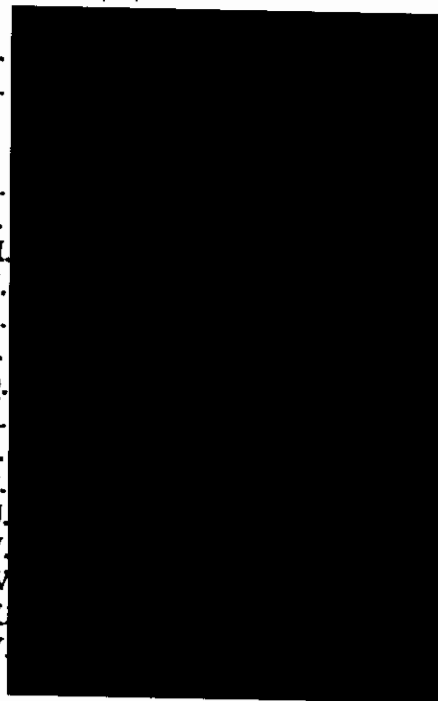
1. The following Officers are nominated by the U. S. Marine Corps to serve as potential Presiding Officers for Military Commissions:

A.
B.
C.
D.
E.



2. The following Officers are nominated by the U. S. Marine Corps to serve as potential Members for Military Commissions:

F.
G.
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Enclosure (2)

Attach 2 to Review Exhibit _____

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001863

U. S. NAVY NOMINATIONS

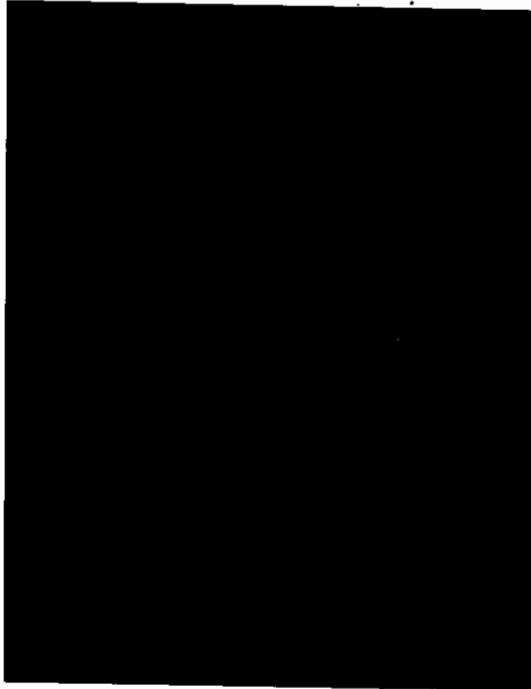
1. The following Officers are nominated by the U. S. Navy to serve as potential Presiding Officers for Military Commissions:

A.
B.
C.
D.
E.



2. The following Officers are nominated by the U. S. Navy to serve as potential Members for Military Commissions:

F.
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Attach 2 to Review Exhibit _____

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001864

| HODA STAFF ACTION MEMORANDUM | | | | <input type="checkbox"/> URGENT <input type="checkbox"/> ROUTINE | |
|---|---------|---|-----------|--|--------------------|
| 1. SUBJECT: Personnel to serve on Military Commissions | | | | 2. TODAY'S DATE 13 Feb 04 | |
| 3. OFFICE SYMBOL DAMP-OPS | | 4. HODA/SACO Control Number | | 5. SUSPENSE DATE | |
| 6. TYPE OF ACTION: | | OSD: <input type="checkbox"/> Congressional: <input type="checkbox"/> EOH: <input type="checkbox"/> Other: <input type="checkbox"/> | | | |
| 7. DISPOSITION: | | <input type="checkbox"/> Approve <input type="checkbox"/> Signature <input type="checkbox"/> Information <input type="checkbox"/> Decision <input type="checkbox"/> Other | | | |
| 8. BACKGROUN: (Describe the task, origin of the action, issue and the requirement. Provide fact-filled background and comments. List most important information first.) | | • OSD requested that the Army establish a pool of Officers to serve as members of Military Commissions. | | | |
| 10. EXECUTIVE SUMMARY: (Short and clear statement of purpose, major issue, and objective. Why are you telling this to the EOH? What should EOH know and discuss? What is the objective of the action?) | | | | | |
| • Purpose: To obtain approval from the Division Chief to nominate the Officers at TAB A to serve on the Military Commission. • Issue: OSD requested the Services to establish a pool of Officers to serve as members of Military Commissions. • Bottom Line: • The Officers at TAB A are being nominated to serve on Military Commissions. | | | | | |
| 11. RECOMMENDATION (Provide a brief statement defining the desired action by the final approval authority and explain why this is the best option). Chief, Operations Division sign the enclosed memorandum. | | | | | |
| 12. PRINCIPAL APPROVALS (Lead Agency Use Only) | | | | | |
| TITLE | INITIAL | DATE (DD MM YY) | TITLE | INITIALS | DATE (DD MM YY) |
| BRANCH CHIEF | | 13 02 04 | DIRECTOR | | |
| DIVISION | | 13 FEB 04 | PRINCIPAL | | |
| 13. ACTION OFFICER NAME (Name/Position/Phone Number/Email) | | | | | |
| 14. SACO NAME (Name/Position/Phone Number/Email) | | | | | |
| 15. FILE LOCATION (IDENTIFY FILE LOCATION - EXAMPLE: J:\COMMON\B DOE\CONGRESSIONALS\CIVPAY.DOC) N:\ODL\Operations Branch\Military Commissions | | | | | |



DEPARTMENT OF THE ARMY
Office of the Provost Marshal General
2800 Army Pentagon
Washington, D.C. 20310-2800

REPLY TO
ATTENTION OF:

DAPM-OPS

MEMORANDUM THRU

THE JUDGE ADVOCATE GENERAL

ARMY GENERAL COUNSEL *Tom Taylor 17 Feb 04*

FOR GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

SUBJECT: Identifying Personnel to Serve as Members and Presiding Officers for
Military Commissions

1. The enclosed files are submitted pursuant to your letter of December 20, 2002, directing that each Service identify 25 officers who meet eligibility criteria for service as military commission members and presiding officers. Enclosed please find a list of all nominated personnel. They are divided in category by primary and alternate candidates for military commission members, both active and reserve component. Candidates for service as presiding officer are comprised of active, reserve component and retired officers who have volunteered for recall to active duty (TAB A). Note that the Army has forwarded completed packets for 32 board members and 18 presiding officer nominees

a. At TAB B are the files pertaining to nominees for military commission membership. Files of active component nominees are at TAB B (1); at TAB B (2) are reserve component nominees. Tab B (3) are the alternate candidates.

b. At TAB C are the files pertaining to nominees for presiding officer service. Files of active component nominees are at TAB C (1); at TAB C (2) are reserve component nominees; at TAB C (3) are retired Officer nominees.

2. POC is MSG Homer, DSN 224-5052 or COMM (703) 614-5052.

3 Encls

MICHAEL S. GALLOUCIS
COL, MP
Chief, Operations Division

Attach 2 Review Exhibit _____

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001866

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Active Duty Presiding Officer Candidates

Attch 2+ Review Exhibit _____

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COL
LTC

Reserve or National Guard Presiding Officer Candidates

LTC
COL
COL
COL
COL
LTC
LTC
LTC
COL

Retired Presiding Officer Candidates

COL (Ret)
COL (Ret)
COL (Ret)
COL (Ret)

* indicates members previously nominated on 24 January 2003.

attach 2 to Review Exhibit _____

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DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC 20330

Office Of The General Counsel

FEB 24 2004

MEMORANDUM FOR DEPARTMENT OF DEFENSE GENERAL COUNSEL

FROM: SAF/GC

SUBJECT: Nomination of Officers to Serve on Military Commissions

Per your request, attached is a list of officers nominated by the Air Force to serve as members of Military Commissions. All possess the necessary security clearance and all are immediately available. The names of the individuals nominated for the position of Presiding Officer were forwarded to you last year along with completed Military Commission Member Data sheets and their three most recent Officer Performance Reports. Of the nominees to be Commission Members, the Military Commission Member Data sheets and most recent three Officer Performance Reports for Lieutenant Colonel Michael Pandolfo and Lieutenant Colonel Dennis Vaillancourt were forwarded to you when they were previously nominated. Attached are Military Commission Member Data sheets and the three most recent Officer Performance Reports for the remaining 33 of our nominees to be Commission Members.


MARY L. WALKER
General Counsel

Attachment:
Nominees for Military Commission Membership

Attach 24 Review Exhibit _____

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Air Force Nominees for Military Commission Membership

Presiding Officers

- 1.
- 2.
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- 4.
- 5.

Commission Members

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270 Review Exhibit _____

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